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## 1. GENERAL BACKGROUND

New Zealand is a unitary State, within which a system of common law operates.<sup>1</sup> However, most of the law relating to children is governed by statute. The main legislation dealing with guardianship, access and custody rights of children is the Care of Children Act 2004. The 2004 Act repeals the former legislation, namely, the Guardianship Act 1968. This latter Act had been amended a number of times. In particular, the Guardianship Amendment Act 1991 amended the 1968 Act so as to implement the 1980 Hague Convention on the Civil Aspects of International Child Abduction (hereafter '1980 Hague Convention'). The Care of Children Act 2004, which came into force on 1 July 2005,<sup>2</sup> reforms and replaces both the Guardianship Act 1968 and the Guardianship Amendment Act 1991, and governs abduction matters.<sup>3</sup>

### 1.1 IMPLEMENTATION OF THE CONVENTION

The 1980 Hague Convention was acceded to by New Zealand on 31 May 1991 and came into force on 1 August 1991. New Zealand was the 19<sup>th</sup> Contracting State (the third State to accede,<sup>4</sup> but with 16 States having previously ratified).<sup>5</sup>

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<sup>1</sup> New Zealand means the islands and territories within the Realm of New Zealand but does not include the self-governing state of the Cook Islands, the self-governing State of Niue, Tokelau or the Ross Dependency. See Interpretation Act 1999, section 29. The New Zealand Government specifically declared when it became a Member State of the Hague Conference on 5 February 2002 (see post at 1.2) that its membership shall not extend to Tokelau unless and until a Declaration to this effect is lodged by the Government of New Zealand with the Depository on the basis of appropriate consultation with that territory.

<sup>2</sup> See section 2 of the 2004 Act.

<sup>3</sup> The 2004 Act essentially re-enacts the provisions in the Guardianship Amendment Act 1991. In general, the only differences are that the Act accords with the new style of legislative drafting. However, on occasion, e.g. when defining rights of custody (see post at 1.1), the 2004 Act makes substantive changes.

<sup>4</sup> Hungary and Belize had previously acceded.

<sup>5</sup> Namely, Argentina, Australia, Austria, Canada, Denmark, France, Germany, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom.

The 1980 Hague Convention was originally implemented into domestic legislation through the Guardianship Amendment Act 1991 (and the relevant provisions are now contained in Part 2, sub-part 4 of the Care of Children Act 2004). The Convention is one of only three Hague conventions that New Zealand has accepted.<sup>6</sup> New Zealand's instrument of accession included two reservations.<sup>7</sup> Neither the Care of Children Act 2004 nor its predecessor, the Guardianship Amendment Act 1991, incorporates the Convention directly into New Zealand domestic law. Instead, while the Convention is included in Schedule 1 to the 2004 Act (replacing the Schedule to the 1991 Act), the main body of the legislation reproduces key Convention Articles, not in identical terms, but it is these latter provisions that are binding on the courts. This is somewhat unusual<sup>8</sup> and not only has the potential to cause difficulties for the judiciary when interpreting the legislation in Convention cases, but theoretically at least could also result in New Zealand failing to fulfil its Convention obligations. For example, the duties placed on the Central Authority are, arguably, not as extensive in section 10(3) of the 2004 Act (replacing section 10(2) of the Guardianship Amendment Act 1991) as they are under the Convention (specifically in Article 7).<sup>9</sup> The problematic nature of the differences between the Convention and the domestic legislation in relation to the duties upon the Central Authority is compounded by section 100(1) of the 2004 Act (replacing section 7 of the Guardianship Amendment Act 1991) which provides that the Central Authority 'shall have all the duties, may exercise all the powers, and shall perform all the functions, that a Central Authority has under the Convention'. Yet, as just explained, a number of those functions and duties are not specifically included in the domestic legislation.<sup>10</sup>

The difficulties of not incorporating the Convention directly have been illustrated on a number of occasions. In 1994 the legislation had to be amended in order to change the definition of 'rights of custody' in the Guardianship Amendment Act 1991. When that Act was originally passed the definition of 'rights of custody' required both the right to possession and care of the child and, "to the extent permitted by the right to possession and care, the right to determine where the child is to live."<sup>11</sup> This was a narrower definition than that in the Con-

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<sup>6</sup> The other two are the 1993 Hague Convention for the Protection of Children and Co-operation in Respect of Intercountry Adoption and the 1961 Hague Convention Abolishing the Requirement for the Legalisation for Foreign Public Documents.

<sup>7</sup> The reservations state that: "The Government of New Zealand hereby declares in accordance with Article 24 and Article 42 of the Convention that any application, communication or other document sent to its Central Authority should either be in the English language or accompanied by a translation thereof in the English language; and the Government of New Zealand hereby further declares in accordance with Article 26 and Article 42 of the Convention that it reserves the right not to be bound to assume the costs referred to in Article 26 resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice." See post at 3.4.

<sup>8</sup> Although Australia also incorporated the Convention in a similar manner to New Zealand.

<sup>9</sup> However, it should be noted that those duties not included in the 2004 Act relate either to the bilateral obligations between the Contracting States, such as the sharing of information, or to the provision of legal aid, which, as will be seen post at 3.4, is the subject matter of one of the reservations made when New Zealand acceded to the Convention. Indeed the New Zealand Government Departments (in correspondence with the authors of this report: May 2004) take the view that Article 7 *is* effectively incorporated.

<sup>10</sup> For a specific example of this see post at 4.2 in relation to access applications.

<sup>11</sup> See the original Guardianship Amendment Act 1991, section 4(1)(b).

vention, which, by Article 5(a) provides that rights of custody ‘shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence’. The definition in the New Zealand legislation allowed for either a narrow or wide interpretation, and could result in a parent with access rights only, even with the right to control the residence of the child, not satisfying the requirements of ‘rights of custody’ under section 4.<sup>12</sup> The Guardianship Amendment Act 1991 was therefore amended to bring the domestic legislation into line with the Convention.<sup>13</sup> Interestingly, the wording of this provision has been changed again with section 97 of the Care of Children Act 2004 now providing:

“For the purposes of this sub-part, ‘rights of custody’, in relation to a child, include the following rights attributed to a person, institution, or other body, either jointly or alone, under the law of the Contracting State in which the children are habitually resident immediately before the child’s removal or retention:

- (a) rights relating to the care of the person of the child (*for example, the role of providing day-to-day care for the child*); and
  - (b) in particular, the right to determine the child’s place of residence”.
- [Emphasis added].

As a result of the words highlighted this definition is now arguably wider than that provided for by the Convention albeit that it reflects New Zealand’s acceptance of the notion of inchoate rights of custody.<sup>14</sup> Another issue, namely, the right of the Central Authority to make an application to the court under what was formerly section 20 of the Guardianship Amendment Act regarding access applications (now section 113 of the 2004 Act), has also been subject to a legal challenge.<sup>15</sup> Such difficulties could have been avoided if the original legislation had simply directly incorporated the Convention as is more commonly the case in other Contracting States.

## 1.2 OTHER CONTRACTING STATES ACCEPTED BY NEW ZEALAND

Although New Zealand is now (that is as from 5 February 2002) a Member State of the Hague Conference it was not a Member State at the time of the 14<sup>th</sup> Session, when the 1980 Hague Convention was drafted and consequently was not entitled to be a ratifying State. However, it was entitled to accede in accordance with Article 38. Under the terms of that Article the existing Contracting States at the time of accession could choose whether or not to accept New Zealand’s

<sup>12</sup> For example see *F v I* High Court, Napier AP 10/94, 24 May 1994. See further, Butterworth’s *Family Law in New Zealand* (11<sup>th</sup> edition), p. 593 (hereafter ‘*Butterworth’s Family Law*’). See also Casey, M., and de Jong, L., ‘Hague Convention on Civil Aspects of Child Abduction’, New Zealand Law Society Seminar, March 1995, pp. 7-9 and 11-12 (hereafter ‘*Casey and de Jong, 1995*’).

<sup>13</sup> See Guardianship Amendment Act (no 2) 1994.

<sup>14</sup> See *Anderson v Paterson* [2002] NZFLR 641. This concept has also been accepted by the English courts, see e.g. *Re B (A Minor)(Abduction)* [1994] 2 FLR 249 and *Re F (Abduction: Unmarried Father: Sole Carer)* [2002] EWHC 2896 (Fam), [2003] 1 FLR 839, but not by the Irish courts, see *HI v MG (Child Abduction: Wrongful Removal)* [2000] IR 110.

<sup>15</sup> See post at 4.2.

accession (including previously acceding States)<sup>16</sup> and it only came into force between such States when the acceptance of each took effect.<sup>17</sup> States *ratifying* after New Zealand's accession also have the right to determine whether or not to accept New Zealand.<sup>18</sup> However, in turn New Zealand has the right to determine whether or not to accept subsequent *acceding* States. In this latter regard New Zealand's general policy is to accept accessions (save where there are perceived to be problems) since that provides a mechanism to help New Zealand children taken overseas.<sup>19</sup> Indeed, New Zealand is in favour of universal application of the Convention between members. The New Zealand practice is that officials at the Ministry of Justice seek advice from officials at the Ministry of Foreign Affairs and Trade as to whether there are any reasons relating to New Zealand's relations with an acceding State that would preclude its acceptance. If the Ministry of Foreign Affairs and Trade does not provide any such reasons with respect to the acceding State then it is accepted by the Minister of Justice. As of 1 January 2005 the Convention was in force between 68 Contracting States and New Zealand. In relation to Contracting States, the Care of Children Act 2004 (formerly the Guardianship Amendment Act 1991) only applies to those wrongful removals or retentions occurring after the commencement of the 1991 Act, viz., on or after 1 August 1991.<sup>20</sup>

For a full list of States with which the Convention is in force with New Zealand, and the dates that the Convention entered into force for the relevant States, see the Appendix.

### 1.3 BILATERAL AGREEMENTS WITH NON-CONVENTION STATES

New Zealand has made no bilateral agreements with non-Convention states. However, section 81 of the Care of Children Act 2004 (formerly section 22A of the Guardianship Act 1968) does provide for mechanisms that allow for the reciprocal registration of prescribed overseas countries' custody and access orders. Although it was originally contemplated that arrangements would be made with Australia and the United Kingdom, in fact only the former was a prescribed country under the 1968 Act, and no doubt that will continue to be the case under the 2004 Act.<sup>21</sup>

<sup>16</sup> In New Zealand's case, of the two previously acceding States, Hungary but not Belize has so far accepted New Zealand's accession.

<sup>17</sup> As a matter of fact all the existing ratifying States accepted New Zealand's accession.

<sup>18</sup> Again, most such States have in fact accepted New Zealand's accession, save for Bosnia and Herzegovina, the Former Republic of Macedonia and Turkey. Croatia accepted New Zealand's accession with effect from 1 February 2005.

<sup>19</sup> In 2003, for example, New Zealand accepted the accession of the following 15 States, namely, Belarus, Belgium, Brazil, China - Macao Special Administrative Region, Costa Rica, El Salvador, Malta, Republic of Moldova, Nicaragua, Paraguay, Serbia and Montenegro, Trinidad and Tobago, Turkmenistan, Uruguay and Uzbekistan and, with effect of 1 January 2005, those of Bulgaria, Estonia, Guatemala, Latvia, Lithuania, Peru, Sri Lanka and Thailand.

<sup>20</sup> See section 96 of the 2004 Act. But it is also the case that the Act cannot be applied before the date when the particular State accepted New Zealand's accession.

<sup>21</sup> Overseas countries whose access and custody orders were recognised were prescribed by Order in Council under section 22K of the Guardianship Act 1968. The reciprocal provisions of section 22A-L insofar as they related to the United Kingdom were repealed by the Guardianship Amendment Act 1991, section 31.

In respect of children brought to New Zealand from a non-Convention State, the law prior to the Guardianship Amendment Act 1991 applies. As explained in *Re B (infants)*,<sup>22</sup> ‘where in any proceedings ... relating to the custody or guardianship of a child ... the Court shall have regard to the welfare of the child as the first and paramount consideration’. An overseas order would be given effect without further enquiry if it is in the best interest of the child, but in practice the custody of the child is often considered on its merits. Even in non-Convention cases, the courts will still have regard to the 1980 Hague Convention in exercising their discretion.

#### 1.4 CONVENTION NOT APPLICABLE IN INTERNAL ABDUCTIONS

The Hague Convention does not apply to abductions within New Zealand. Instead this is dealt with by the civil warrant process. The criminal law is rarely invoked notwithstanding that section 210 of the Crimes Act 1961 makes it a criminal offence intentionally to deprive any parent or guardian or other person having the lawful care or charge of any child under 16 of possession of that child, by taking or enticing away the child.<sup>23</sup> It is immaterial whether the child consented. Under section 210(3) it is not an offence if the person claims in good faith to have a right to possession of the child. However, a ‘right to possession’ does not extend to the parent who breaches a custody or access agreement, for example by keeping the child beyond the terms set out under the access arrangements. Although the parent may have had a right to possession at the time of taking the child under the access arrangements, that lawful possession does not continue to the later time if the parent then deliberately fails to return the child.<sup>24</sup> A parent who deprives their child from the other parent, may therefore, be subject to the criminal law. In addition, the civil law can be used to remedy internal abductions by a parent. Specifically, an order providing for the day-to-day care of a child can be enforced by a warrant obtained under section 72 of the Care of Children Act 2004 (formerly section 19 of the Guardianship Act 1968) and under section 78 of the Care of Children Act 2004 (formerly section 19B(3) of the Guardianship Act 1968) it is an offence to wilfully resist or obstruct execution of a warrant.<sup>25</sup>

<sup>22</sup> [1971] NZLR 143 and discussed in *Butterworth’s Family Law*, op. cit., n. 12, p. 589.

<sup>23</sup> Section 210 states ‘Abduction of child under 16—

(1) Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to deprive any parent or guardian or other person having the lawful care or charge of any child under the age of 16 years of the possession of the child, or with intent to have sexual intercourse with any child being a girl under that age, unlawfully—

(a) Takes or entices away or detains the child; or

(b) Receives the child, knowing that the child has been so taken or enticed away or detained.

(2) It is immaterial whether or not the child consents, or is taken or goes at the child’s own suggestion, or whether or not the offender believed the child to be of or over the age of 16.

(3) No one shall be convicted of an offence against this section who gets possession of any child, claiming in good faith a right to the possession of the child.’

<sup>24</sup> See the majority decision in *R v Tauilili* [1997] 1 NZLR 525 (CA).

<sup>25</sup> For which the offender is liable to imprisonment of a term not exceeding 3 months or a fine not exceeding £2,500 (increased from the former maximum of \$1,000).

## 2. THE ADMINISTRATIVE AND JUDICIAL BODIES DESIGNATED UNDER THE CONVENTION

### 2.1 CENTRAL AUTHORITY

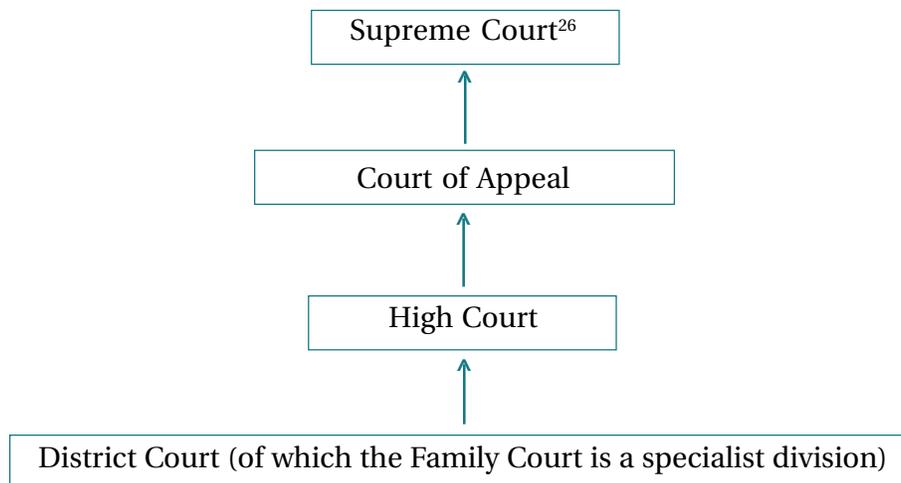
There is only one Central Authority in New Zealand. Section 100(1) of the Care of Children Act 2004 (formerly section 7 of the Guardianship Amendment Act 1991) designates the 'secretary' as the Central Authority. Section 8, the interpretation section, defines 'secretary' as the Secretary for Justice.

The Central Authority is sparsely staffed, with nearly all of the work being carried out by one person, the "Hague Convention Advisor". The Hague Convention Advisor spends about 80% of her time on Convention cases, with the rest of her time being spent on overseas maintenance and custody, domestic violence orders and arranging for the service of foreign civil proceedings. Until as recently as 2004 the Hague Convention Advisor had no support staff to assist her in her work but has always been able to obtain legal advice from the office solicitor, who also has overall responsibility for the running of the office. The office solicitor spends approximately 5% of his time on Convention work. However, in part as a response to a draft of this report, arrangements have now been made for the support officer for the office solicitors to deputise for the Advisor during her absence. It is the Advisor's task to train this support officer. Although the New Zealand Central Authority remains somewhat sparsely staffed it benefits greatly from the expertise of the current Hague Convention Advisor who has been in post since New Zealand acceded to the Convention in 1991. Without doubt, the Convention Advisor's experience and expertise contributes to the efficiency with which the office is run. However, given that this has largely been a one person operation, there is at least the danger that the expertise will be lost if the current incumbent leaves the post though obviously this danger has been mitigated to a certain extent with the introduction of the new arrangements for the support officer to deputise for the Advisor. The Central Authority can be contacted at:

Hague Convention Advisor  
Ministry of Justice  
PO Box 180  
WELLINGTON  
Tel: +64 4 918 8800  
Fax: +64 4 918 8820

### 2.2 COURTS AND JUDGES EMPOWERED TO HEAR CONVENTION CASES

The Court system in New Zealand has the following structure:



Section 101 of the Care of Children Act 2004 (formerly section 8 of the Guardianship Amendment Act 1991) provides that the courts with jurisdiction to hear Convention cases are a Family Court or a District Court. There are 66 District Courts in New Zealand and a maximum of 140 District Court judges.<sup>27</sup> The Family Court, on the other hand, has 40 judges.<sup>28</sup> An application may be transferred to the High Court if it would be more appropriate, or more expeditious, to be dealt with there.<sup>29</sup> The High Court is made up of up to a maximum of 56 judges, including the head of the Judiciary, the Chief Justice.<sup>30</sup> Potentially therefore, there are 180 judges who may hear 1980 Hague Convention cases at first instance.<sup>31</sup> In practice, however, almost all Convention applications are filed in a Family Court and jurisdiction is thus confined to 40 specialist judges.

The Family Court can sit in 55 different locations, the practice being in abduction cases to hear the case wherever it is filed.

### 3. OPERATING THE CONVENTION – INCOMING APPLICATIONS FOR RETURN

#### 3.1 LOCATING THE CHILD

Section 103(3) of the Care of Children Act 2004 (formerly section 10(2) of the Guardianship Amendment Act 1991) requires the Central Authority to take or cause to be taken all appropriate measures to discover where the child is. The New Zealand Central Authority does not generally experience problems locating a child brought to New Zealand. Most abducting parents are New Zealanders

<sup>26</sup> As from 1 January 2004 the Supreme Court became the final court of appeal in New Zealand, replacing the Privy Council in London.

<sup>27</sup> The District Courts Act 1947, section 52 as amended by the Judicial Matters Act 2004.

<sup>28</sup> Including the Principal Family Court Judge, and the Chief District Court Judge.

<sup>29</sup> See *Trapski's Family Law* Volume 4, (Wellington, Brooker's, 1994, updated to 13 January 2004) (hereafter '*Trapski's Family Law*').

<sup>30</sup> Judicature Act 1908, section 4(1)(b), as amended by the Judicial Matters Act 2004.

<sup>31</sup> At an appeal level, the Court of Appeal is made up of 6 judges plus the President and the Chief Justice. The new Supreme Court is made up of the Chief Justice and 4 other judges. The Supreme Court Act 2003 allows for at least 4 and no more than 5 other judges. The Attorney General, Margaret Wilson, appointed 4 judges and the Chief Justice to the Supreme Court in November 2003.

returning home<sup>32</sup> and the address where they will return to is often known, or easy to find. Given that New Zealand is a small country in terms of both its population and its geography there are no major difficulties with location. However, if the Central Authority is unable to locate the child, it will contact Interpol who will make an attempt to find the child. If that fails, the Central Authority will appoint a lawyer and request them to obtain a warrant from the court. As will be seen post at 3.7, where there are reasonable grounds to believe that attempts will be made to conceal the whereabouts of the child in order to defeat an application made for the return of the child (before a return order has been granted),<sup>33</sup> section 117 of the Care of Children Act 2004 (formerly section 24 of the Guardianship Amendment Act 1991) allows a warrant to be issued to allow possession of the child to be taken by the person authorised in the warrant to do so (i.e. a police officer or social worker). The police will then search for the child.

### 3.2 CENTRAL AUTHORITY PROCEDURE

New Zealand's accession included the reservation that documents sent to its Central Authority must be in English or be accompanied by a translation in English (according to Articles 24 and 42). The Central Authority has not experienced any difficulties with translation of incoming applications; indeed, all applications received have been received in English. Given that the majority of applications come from English speaking countries (Australia, USA and the UK)<sup>34</sup> one would not expect any problems in this regard.

There are three ways in which a person seeking the return of the child who has been brought to New Zealand can apply for the return of the child.<sup>35</sup> First, they can apply to the Central Authority of the State in which the child was habitually resident prior to the removal, which will then apply to the New Zealand Central Authority. Secondly, the applicant can apply directly to the New Zealand Central Authority. Section 103 of the Care of Children Act 2004 (formerly section 10 of the 1991 Guardian Amendment Act 1991) does not specify who that applicant must be. There is therefore, no requirement that it be another Central Authority.<sup>36</sup> Thirdly, under section 105 of the 2004 Act (formerly section 12 of the 1991 Act), an applicant can apply directly to the court (Family Court or District Court) as provided for by Article 29 of the 1980 Hague Convention.

<sup>32</sup> Interview with the New Zealand Central Authority, January 2004, which is supported by the findings of *A Statistical Analysis of Applications made in 1999 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* drawn up by Professor Nigel Lowe, Sarah Armstrong and Anest Mathias. Available at [http://www.hcch.net/index\\_en.php?act=publications.details&pid=2848&dtid=32](http://www.hcch.net/index_en.php?act=publications.details&pid=2848&dtid=32) (hereafter '1999 Statistical Survey'), Part II, *New Zealand Report*, which found that in 84% of the return applications made under the 1980 Hague Convention to New Zealand, the abductors had New Zealand nationality (globally it was found that 52% of abductors had the same nationality as the requested State).

<sup>33</sup> Under section 95 of the Care of Children Act 2004 (formerly section 10 of the 1991 Act).

<sup>34</sup> According to the 1999 Statistical Survey, *op. cit.*, n. 32, 97% of return applications came from these three countries, the vast majority being from Australia. According to the 2002 statistics provided by the New Zealand Central Authority in December 2003 (hereafter '2002 Statistics'), all the return applications came from English speaking countries (*viz.* Australia, South Africa and the United Kingdom) – see post at 7.1.1.

<sup>35</sup> See *Butterworth's Family Law*, *op. cit.*, n. 12, pp. 590-591.

<sup>36</sup> As under Article 8 of the Convention.

Most applicants apply via their own Central Authority to the New Zealand Central Authority under section 103 of the 2004 Act (formerly section 10 of the 1991 Act). When the Central Authority receives an application, it will appoint counsel. The appointment of a particular lawyer is based on the location of the child, and made following discussions with the relevant court staff.<sup>37</sup> In most cases the appointed counsel will lodge proceedings with the court under section 105 of the 2004 Act (formerly section 12 of the 1991 Act). Applying to the Central Authority under section 103 (formerly section 10) rather than directly to the court has a number of advantages for the applicant, partly because of the duties placed on the Central Authority by section 103(3) of the 2004 Act (formerly section 10(2) of the 1991 Act). First, the Central Authority must take all appropriate measures to locate the child,<sup>38</sup> so where the child's whereabouts are unknown the Central Authority's assistance will be vital. Secondly, the Central Authority has an obligation to ensure the safety of the child.<sup>39</sup> Accordingly, if care and protection issues are raised a copy of the application will be sent to the Department of Child, Youth and Family (the department responsible for the care and protection of children), with details of the concerns to be investigated. Thirdly, the Central Authority also has a duty to 'have the child returned voluntarily or arrange an amicable solution'.<sup>40</sup> In practice, the Central Authority does not seek voluntary resolution (for example, by writing letters *before* appointing counsel, or by asking counsel to write letters seeking voluntary resolution).<sup>41</sup> There are those that argue<sup>42</sup> that a failure by the Central Authority actively to promote voluntary resolution amounts to a breach of duty, in New Zealand's case, under both section 103(3) of the Care of Children Act 2004 (formerly section 10(2) of the Guardianship Amendment Act 1991) and Article 7 of the Convention. It may also be a breach of section 103(1) of the 2004 Act (formerly section 10(1) of the 1991 Act) which requires the Central Authority to take action to secure the prompt return of the child to the applicant. Whether this is a fair criticism may be debated. The New Zealand Ministry itself, relying on the Pérez-Vera Explanatory Report on the Convention,<sup>43</sup> maintain that Article 7(c) of the Hague Convention vests in the Central Authority the power to decide when and if attempts should be made to secure a voluntary return or to bring about an amicable solution.<sup>44</sup> A voluntary resolution would, in most

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<sup>37</sup> See post at 3.3.

<sup>38</sup> Section 103(3)(a) of the Care of Children Act 2004 (formerly section 10(2)(a) Guardianship Amendment Act 1991).

<sup>39</sup> Section 103(3)(b) of the 2004 Act (formerly section 10(2)(b) Guardianship Amendment Act 1991).

<sup>40</sup> Section 103(3)(c) of the 2004 Act (formerly section 10(2)(c) Guardianship Amendment Act 1991).

<sup>41</sup> Interview with Central Authority in January 2004. According to *Trapski's Family Law*, op. cit., n. 29, Vol. IV, in practice the Central Authority relies on counsel for the Central Authority or the applicant to negotiate the voluntary return of the child or to seek a resolution. However, according to the 1999 Statistical Survey, op. cit., n. 32, 10% (4 out of 38) of return applications were resolved voluntarily. See post at 7.1.2. See also *C. v S. [Child Abduction]* [1995] 13 FRNZ 683.

<sup>42</sup> See the criticism of the similar English system by Armstrong, "Is the Jurisdiction of England and Wales Correctly Applying the 1980 Hague Convention on the Civil Aspects of International Child Abduction"? (2002) 51 ICLQ 427.

<sup>43</sup> Eliza Pérez-Vera Explanatory Report on the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereafter 'Pérez-Vera Report') paras. 89-92.

<sup>44</sup> Correspondence with the authors of this Report in May 2004.

circumstances, presumably be quicker than making an application under section 105 of the 2004 Act (formerly section 12 of the 1991 Act). However, as will be seen post at 7.1.3, New Zealand does have a good record of prompt returns although, ironically, according to the 1999 Statistical Survey<sup>45</sup> voluntary returns were slower overall than judicially ordered returns.<sup>46</sup> Finally, under section 103(3)(d) of the 2004 Act (formerly section 10(2)(d) of the 1991 Act) the Central Authority must facilitate the making of an application under section 105 of the 2004 Act (formerly section 12 of the 1991 Act). Appointing experienced and expert counsel, the cost of which is borne by the Crown, is one way this is done.

As noted above, the applicant can choose to apply directly to the court under section 105 of the 2004 Act (formerly section 12 of the 1991 Act). Although unusual,<sup>47</sup> this may occur where the applicant wishes to choose his or her own counsel, and can afford to do so, rather than use the lawyer appointed by the Central Authority.<sup>48</sup>

The Central Authority has no obligation to take any action where an application is unfounded, for example, where the applicant has failed to show that they had rights of custody in respect of the child.<sup>49</sup> Where the Hague Convention Advisor is considering rejecting an application, she will ordinarily consult with the office solicitor first.

### 3.3 LEGAL REPRESENTATION

Where an application for the return of a child is made under sections 103 or 105 of the 2004 Act (formerly sections 10 or 12 of the 1991 Act), and the applicant does not have legal representation the Central Authority must, *where the circumstances require*, appoint a barrister or solicitor to represent the applicant.<sup>50</sup> The Central Authority does then, have some discretion as to whether or not to appoint counsel. In most cases however, the Central Authority will appoint counsel for the unrepresented applicant. Counsel are drawn from what is, in effect, an unofficial panel of lawyers from around New Zealand. Counsel are

<sup>45</sup> 1999 Statistical Study, op. cit., n. 32.

<sup>46</sup> The Ministry's experience is that voluntary returns rarely happen without negotiation and therefore tend to be slower than judicially ordered returns. Correspondence with the authors of this Report in May 2004.

<sup>47</sup> This was unanimous view of those we interviewed, though no figures are available.

<sup>48</sup> *Butterworth's Family Law*, op. cit., n. 12, p. 591 suggests that applying directly to the court may be preferred where the matter is urgent, implying that this route would be quicker for the applicant than sending an application to the New Zealand Central Authority. However, this is not our understanding. Given the efficiency with which the New Zealand Central Authority operates, there is nothing to suggest that applying to the New Zealand Central Authority under section 103 of the 2004 Act (formerly section 10 of the 1991 Act) would be any slower than applying directly to the Courts under section 105 of the 2004 Act (formerly section 12 of the 1991 Act) (though applying first to the Central Authority in which the child was habitually resident prior to being brought to New Zealand may well slow the process down, depending on which country that is).

<sup>49</sup> See section 123 of the Care of Children Act 2004 (formerly section 29 of the Guardianship Amendment Act 1991). There were no such rejections recorded in the 1999 Statistical Survey, op. cit., n. 32, though according to the 2002 Statistics, op. cit., n. 34, there was one rejection. See post at 7.1.2.

<sup>50</sup> Section 117 of the Care of Children Act 2004 (formerly section 23 of the Guardianship Amendment Act 1991).

appointed, depending on their location, by the Hague Convention Advisor following consultation with the relevant court staff. Using a select number of lawyers ensures that the applicant receives expert legal representation which is more effective for the public purse but could also potentially act as a barrier for other lawyers who might be interested in working on Convention cases.

The appointed counsel represents 'the applicant' who is defined by section 95 of the 2004 Act (formerly section 2 of the Guardianship Amendment Act 1991) as a person by whom or on whose behalf the application is made. In turn, a 'person' is defined as including 'any institution or other body having rights of custody in respect of a child'. Therefore, counsel does NOT represent the child, but the person whose rights of custody or access have been breached. However, separate representation for a child is possible and indeed counsel for a child has been appointed on a number of occasions.<sup>51</sup> This was formerly done under the authority of the Guardianship Act 1968, rather than the Guardianship Amendment Act 1991,<sup>52</sup> and is now provided for by section 7 of the Care of Children Act 2004.

### 3.4 COSTS AND LEGAL AID

New Zealand has entered a reservation under Articles 26 and 42 that it will not be bound to pay for legal costs except insofar as those costs would be covered by the system of legal aid. Section 100(2) of the Care of Children Act 2004 (formerly section 7(2) of the Guardianship Amendment Act 1991) prevents costs being made against the Central Authority for the functions carried out under that Act.

Despite this reservation, New Zealand has a generous system of legal aid for Hague Convention cases.<sup>53</sup> The reservation is never used in practice, and it is not included in the Care of Children Act 2004 (nor formerly in the Guardianship Amendment Act 1991) although it may also be pointed out that the duty under Article 7(g) of the 1980 Hague Convention, namely, 'where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers'; is similarly not included in the 2004 Act (nor formerly in the 1991 Act).

If a solicitor or barrister is appointed under section 116 of the Care of Children Act 2004 (formerly section 23 of the Guardianship Amendment Act 1991) (as discussed ante at 3.3) then under section 131(1) of the 2004 Act (formerly section 30(3) to (7) of the Guardianship Act 1968) will apply. These provisions allow for fees for professional services provided by lawyers and reasonable expenses to be paid out of public money. However, notwithstanding these provisions, section 131(4) of the 2004 Act (formerly section 30(4) and (7) of the 1968 Act), allow the Crown to order any party to the proceedings to refund such amount of the fees and expenses as the Crown directs. This provision is consistent with the reservation according to Articles 26 and 42 of the 1980 Hague Convention.

<sup>51</sup> See *Trapski's Family Law*, op. cit., n. 29, GM 23.08.

<sup>52</sup> Section 30 of the Guardianship Act 1968 gave power to the court to appoint counsel for the child under 'this Act' which, under the Interpretation Act 1999, includes amendment Acts.

<sup>53</sup> Casey and de Jong note that New Zealand is one of only 3 countries (along with Australia and England and Wales) that accepts applications without inquiry into the financial circumstances of the left-behind parent: Casey and de Jong, *International Issues for Family Lawyers* (Wellington, New Zealand Law Society 2003), p. 20 (hereafter 'Casey and de Jong, 2003').

However, this latter provision is only used when the proceedings have been deliberately protracted by the parties.<sup>54</sup> Australia had initially refused to accept New Zealand's accession because of the reservation (because Australia *would* pay full costs).

Where a child is being returned under a section 105(2) order (formerly a section 12(2) order), the Court may, if it thinks it is just, order the person who removed the child to New Zealand to pay the costs of returning the child to the country in which they were habitually resident before being removed.<sup>55</sup> In cases of extreme need, the Central Authority may assist with repatriation costs. If the cost of returning the child has been paid by the Central Authority following a section 105(2) order (formerly a section 12(2) order), the court can order the person who removed the child to New Zealand to refund all or part of those costs to the Crown.<sup>56</sup> Where the respondent has the means to pay, costs will be ordered.<sup>57</sup> A similar position obtains if the child is returned voluntarily without a court order.<sup>58</sup>

### 3.5 LEGAL PROCEEDINGS

Section 107(1) of the Care of Children Act 2004 (formerly section 14(1) of the Guardianship Amendment Act 1991) requires that applications made for the return of the child are given priority by the court, as far as practicable, so as to ensure they are dealt with expeditiously. If the application is not determined within 6 weeks the Central Authority has discretion to request reasons from the Registrar of the court as to why the application has not been dealt with in that time.<sup>59</sup> The Central Authority *must* request reasons if requested by the applicant or the Central Authority of the Contracting State.<sup>60</sup> According to the 1999 Statistical Survey<sup>61</sup> New Zealand was among the most efficient of jurisdictions in disposing of Hague applications, making judicial return orders in an average of under 10 weeks but with voluntary settlements taking a little longer and judicial refusals taking a minimum of 12 weeks and a maximum of nearly 23 weeks. According to statistics provided by the New Zealand Central Authority<sup>62</sup> in 2002 the average time for all disposals under the 1980 Hague Convention was about 10 weeks. Interestingly, according to the *Family Court Caseflow Management Practice Note*<sup>63</sup> 13 weeks is allowed in "cases where a specialist report or other evidence is required which cannot be obtained immediately".

<sup>54</sup> According to *Butterworth's Family Law*, op. cit., n. 12, p. 625. In *Adams v Wigfield* [1994] NZFLR 132 the court held that the party benefiting from the change should meet the costs.

<sup>55</sup> Section 121(1) of the Care of Children Act 2004 (formerly section 28(1) of the Guardian Amendment Act 1991).

<sup>56</sup> Section 121(2) of the Care of Children Act 2004 (formerly section 28(2) of the Guardian Amendment Act 1991).

<sup>57</sup> *Trapski's Family Law*, op. cit., n. 29, Vol. IV.

<sup>58</sup> Section 121(3) of the Care of Children Act 2004 (formerly section 28(3) of the Guardianship Amendment Act 1991).

<sup>59</sup> Section 107(2), (3) of the Care of Children Act 2004 (formerly section 4(2)(b) of the Guardianship Amendment Act 1991).

<sup>60</sup> This is in accordance with the requirement set out in Article 11 of the 1980 Hague Convention.

<sup>61</sup> The 1999 Statistical Survey, op. cit., n. 32, discussed post at 7.1.3.

<sup>62</sup> 2002 Statistics, op. cit., n. 34.

<sup>63</sup> Issued by the Family Court in 1998.

The court can give interim directions before the application is determined if it is for the purpose of securing the welfare of the child concerned or preventing changes in the circumstances relevant to the determination of the application.<sup>64</sup>

Formerly, there were no specific provisions in the Guardianship Amendment Act 1991 concerning the admissibility of evidence and accordingly, section 28 of the Guardianship Act 1968 applied. This section allowed the court to 'receive any evidence that it thinks fit, whether it is otherwise admissible in a court of law or not'. This power is now provided for by section 128 of the Care of Children Act 2004. However, the need for the cases to be dealt with promptly means that evidence is mostly by affidavit, and oral evidence and cross examination are not encouraged.<sup>65</sup> Cross examination and oral evidence, may however be allowed where both parties are available.<sup>66</sup>

Section 105(2) of the 2004 Act (formerly section 12(2) of the 1991 Act) obliges the court to order the return of the child where the grounds for the application are set out and none of the exceptions in section 106 of the 2004 Act (formerly section 98 of the 1991 Act) apply. These exceptions correspond to those in Articles 12 and 13 of the 1980 Hague Convention and also incorporates Article 20 of the Convention<sup>67</sup> that the return of the child is not permitted by the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms.<sup>68</sup> The New Zealand legislation supplements the provisions in Article 20 by also directing the courts when hearing such a "defence" to consider (a) the New Zealand law relating to political refugees or political asylum and (b) whether or not the return would result in discrimination against the child or any other person on any grounds in which discrimination is not permitted by the UN International Covenants on Human Rights.<sup>69</sup> The burden of proof for a successful defence is on the person who opposes the making of the order, and they have to establish one of the exceptions 'to the satisfaction of the Court'. Where objections of the child are relied upon to oppose a return, the child has to be of an appropriate age and have reached a sufficient degree of maturity to have views taken into account.<sup>70</sup>

<sup>64</sup> Section 108 of the Care of Children Act 2004 (formerly section 15 of the Guardianship Amendment Act 1991).

<sup>65</sup> See *Secretary for Justice, ex parte Fisher v Fisher* 15/2/2000 DC Whangarei, FP 60/69 where Principal Family Court Judge Mahony said that Hague Convention cases should proceed on the basis of affidavit evidence alone without any additional oral evidence and chief or cross-examination.

<sup>66</sup> Thus avoiding the unfairness that results if only one party is available to give evidence: Casey and de Jong, 2003, op. cit., n. 53, p. 24.

<sup>67</sup> Section 106(1)(e) of the Care of Children Act 2004 (formerly section 13(1)(e) of the Guardianship Amendment Act of 1991).

<sup>68</sup> Primarily enshrined in the Bill of Rights Act 1990 and the Human Rights Act 1993.

<sup>69</sup> Section 105(2) of the Care of Children Act 2004 (formerly section 13(1) of the Guardianship Amendment Act 1991).

<sup>70</sup> For more information on the case law relating to the exceptions to return, see e.g. *Butterworth's Family Law*, op. cit., n. 12, pp. 603-623 and Casey and de Jong, 1995, op. cit., n. 12, pp. 13-21 and Casey and de Jong, 2003, op. cit., n. 53, pp. 2-15.

If the court refuses to order the child's return then it may either upon application or on its own motion make any interim or final parenting order as it sees fit,<sup>71</sup> the case will then proceed as a normal domestic case.<sup>72</sup>

### 3.6 APPEALS

Appeals have to be filed within 28 days from when the order for the return or decision of the Family Court is made.<sup>73</sup> However, this can, in practice, result in a much longer time frame before the appeal is heard. In one case there was nine months between the original hearing and the appeal, even though the appeal was heard within 28 days of the formal sealing of the judgment.<sup>74</sup> Appeals are dealt with by way of a re-hearing,<sup>75</sup> except appeals as to a question of law. Even re-hearings, however, are not hearings de novo and fresh evidence is only admitted at the court's discretion.

Section 143 of the Care of Children Act 2004 (formerly section 31(2) of the Guardianship Act 1968) allows for appeals to lie to the High Court from a decision of a Family Court or District Court. A further appeal lies to the Court of Appeal: Section 145 of the Care of Children Act 2004 (formerly section 31B of the Guardianship Act 1968) provides:

- “(1) An appeal lies to the Court of Appeal from an order or decision of the High Court under this Act, but
- (a) ...
  - (b) If the order or decision was made on appeal from a Family Court or a District Court, an appeal lies only with the leave of the Court of Appeal.
- (2) The Court of Appeal may, in its discretion, if it thinks that the interests of justice so require, -
- (a) rehear the whole or any part of the evidence; or
  - (b) receive further evidence”.

As from 1 January 2004 a final appeal lies to the Supreme Court which was created by the Supreme Court Act 2003 and replaces the former right to appeal to the Privy Council in London. Under the Supreme Court Act 2003 appeals to the Supreme Court proceed by way of re-hearing,<sup>76</sup> and leave for appeal will only be granted if it concerns a matter of general or public importance,<sup>77</sup> or there is a substantial risk that a miscarriage of justice may occur or has occurred,<sup>78</sup> or

<sup>71</sup> Section 110 of the Care of Children Act 2004 (formerly section 17 of the 1991 Act).

<sup>72</sup> But note: the court must consider whether according to its *domestic* law rules, it has jurisdiction to proceed. The 1980 Hague Convention does *not* confer jurisdiction to hear cases after a return order application has been refused.

<sup>73</sup> Formerly section 31(4) of the Guardianship Act 1968. But note this period has been omitted in the replacement provision, namely, section 143 of the Care of Children Act 2004.

<sup>74</sup> *Chief Executive of Department for Courts v Phelps* [2000] 1 NZLR 168 in which it was noted that there may be a need for legislative changes to avoid this. In one case noted by the 1999 Statistical Survey, op. cit., n. 32, and discussed post at 7.1.3, the appeal was finally disposed of 149 days after the Central Authority first received the application.

<sup>75</sup> *Bay v Bay* [1994] 12 FRNZ 89, 90.

<sup>76</sup> Section 24 of the Supreme Court Act 2003.

<sup>77</sup> Section 13(2)(a) of the Supreme Court Act 2003.

<sup>78</sup> Section 13(2)(b) of the Supreme Court Act 2003.

it is a matter of general commercial significance.<sup>79</sup> Direct appeals to the Supreme Court can only be made from courts other than the Court of Appeal in exceptional circumstances.<sup>80</sup>

### 3.7 ENFORCEMENT OF ORDERS

Where the court has made an order under section 105 of the Care of Children Act 2004 (formerly section 12 of the 1991 Act) for the return of a child, it can issue a warrant under section 119 of the 2004 Act (formerly section 26 of the 1991 Act) either on application by the party to the proceedings or on its own initiative, authorising the police or a social worker or any other person named in the warrant to take possession of the child and deliver her to a person or authority named in the warrant. Such a warrant can be issued at the same time as the order is granted under section 105(2) of the 2004 Act (formerly section 12(2) of the 1991 Act). For the purpose of enforcing a warrant the police officer or social worker is authorised to take possession of the child, the power to enter and search any building, aircraft, ship, vehicle, premises or place.<sup>81</sup> Any person who knowingly resists or obstructs the person from exercising the warrant or who knowingly fails or refuses to give immediate access to premises commits an offence and is liable to imprisonment for a term not exceeding 3 months or a fine of up to \$2,500.<sup>82</sup>

Likewise, where there are reasonable grounds to believe a child will be taken out of New Zealand in an attempt to defeat an application made under sections 103, 105 or 113 of the 2004 Act (formerly sections 10, 12 and 20 of the 1991 Act) a warrant can be granted.

According to the 2002 statistics<sup>83</sup> there were no cases in which a judicial order for return was not enforced.

## 4. OPERATING THE CONVENTION – INCOMING APPLICATIONS FOR ACCESS

### 4.1 CENTRAL AUTHORITY PROCEDURE

Applications for access for a child outside of New Zealand are dealt with under section 111 of the Care of Children Act 2004 (formerly section 19 of the Guardianship Amendment Act 1991) while section 112 of the 2004 Act (formerly section 20 of the 1991 Act) is used for children within New Zealand. Section 112 of the 2004 Act (formerly section 20 of the 1991 Act) requires the Central Authority to make such arrangements as may be appropriate to organise or secure the effective exercise of the applicant's rights of access'. In effect, the procedures are

<sup>79</sup> Section 13(2)(c) of the Supreme Court Act 2003.

<sup>80</sup> Section 14 of the Supreme Court Act 2003.

<sup>81</sup> See section 75 of the Care of Children Act 2004 (formerly section 19B of the Guardianship Act 1968).

<sup>82</sup> See section 79 of the Care of Children Act 2004. Under the former provision, section 19B(3) of the Guardianship Act 1968, the maximum fine was \$1,000. As discussed ante at 3.1, where there is a risk that the child will be concealed in order to defeat an application under section 103 of the 2004 Act (formerly section 10 of the 1991 Act) before an order has been granted, a warrant can also be issued.

<sup>83</sup> 2002 Statistics, op. cit., n. 34.

similar to incoming applications for custody. The Central Authority will appoint counsel who may try and help resolve access without going to court but sometimes will file an application for access under section 51 of the Care of Children Act 2004 (formerly section 15 of the Guardianship Act 1968). According to one commentary,<sup>84</sup> payment of legal fees may only be required in exceptional cases.

#### 4.2 LEGAL PROCEEDINGS

As with incoming applications for return, legal representation is available under section 116 of the Care of Children Act 2004 (formerly section 31 of the Guardianship Amendment Act 1991) for applications for access made under sections 112 and 113 of the 2004 Act (formerly sections 19 and 20 of the Guardianship Amendment Act 1991). However, in 1992 the right of the Central Authority to initiate legal proceedings under what was then section 20 of the 1991 Amendment Act (now section 113 of the 2004 Act) was challenged in *Secretary for Justice v Sigg*.<sup>85</sup> In that case, the Central Authority had received an application under section 20 to assist a father in securing his access rights to his children who had been removed from the USA to New Zealand. Section 20 provides that the Central Authority 'shall make such arrangements as may be appropriate to organise or secure the effective exercise of the applicant's rights of access'.<sup>86</sup> The Central Authority had accordingly applied to the court for an order securing the father's access to his children. The mother consequently argued that the difference between the provisions relating to the return of children to what were then in sections 10-18 of the 1991 Act (now sections 103-111 of the 2004 Act), which explicitly confer power on the Central Authority to apply to the court, and those relating to access in section 20 (now section 113 of the 2004 Act), suggested that the Central Authority did not have the power to initiate court proceedings in relation to access. The court found that although the Guardianship Amendment Act 1991 did not specify the right to apply to the court in respect of access, there was no section which prevented the court application. Bremner J held that the Act must clearly remove the right of application for access to a court before it can be inferred that there is no such right. The judge also looked at what was then section 7 of the Guardianship Amendment Act 1991 (now section 100 of the 2004 Act) which states that the Central Authority, 'shall have all the duties, may exercise all the powers, and shall perform all the functions, that a Central Authority has under the Convention'. In any event Articles 7(f) and 21 of the Abduction Convention give the Central Authority the power to institute proceedings for access cases. *Sigg* has since been followed by *Gumbrell v Jones*<sup>87</sup> which reiterated that section 20 of the

<sup>84</sup> See *Butterworth's Family Law*, op. cit., n. 12, p. 624, based on the wording of section 30(3)-(7) of the Guardianship Act 1968 which applies to access applications with "necessary modification".

<sup>85</sup> [1992] 10 FRNZ 164.

<sup>86</sup> Section 113 of the 2004 Act similarly provides that "The Authority must make any arrangements that may be appropriate to organise or secure the effective exercise of the applicant's right of access".

<sup>87</sup> [2001] NZFLR 593.

Guardianship Amendment Act 1991 should be construed so as to sufficiently authorise the Central Authority to apply for an access order under what was then section 15 of the Guardianship Act 1968 (now section 51 of the 2004 Act) either in its own name or in the name of the applicant.

Although *Sigg* and *Gumbrell v Jones* resulted in an outcome consistent with the wording of the Convention, it again demonstrates the problems caused by not incorporating the exact wording of the Convention into the domestic legislation.<sup>88</sup> According to one commentary,<sup>89</sup> the wording of what is now section 113 of the 2004 Act is sufficiently wide to allow a New Zealand citizen to apply to the Central Authority and to ask for a lawyer to be appointed on their behalf. It is in any event established<sup>90</sup> that provided the (foreign) applicant has a “right of access” there is no requirement that he or she should have access order in their favour.

#### 4.3 ENFORCEMENT OF ORDERS

The enforcement powers are broadly the same in respect of access orders as they are in respect of return orders. It should, however, be borne in mind that execution of access orders is at best a difficult issue.

## 5. OPERATING THE CONVENTION – OUTGOING APPLICATIONS FOR RETURN

### 5.1 PREVENTING THE REMOVAL OF THE CHILD FROM THE JURISDICTION

#### 5.1.1 CIVIL LAW

A parent who fears their child will be removed from New Zealand can also apply to the court for an order to prevent removal under section 77 of the Care of Children Act 2004 (formerly section 20 of the Guardianship Act 1968). That order can include the requirement that the child not be taken out of New Zealand without a further court order; that the child’s passport, or any passport with the

<sup>88</sup> Following discussion with authors of this report in May 2004, the New Zealand Ministry postulate the following. In their view the wording of the duty in Article 7(f) with respect to access issues is identical to that in section 20 (now section 113 of the 2004 Act). Similarly the mandatory requirement in Article 7(f) relating to the custody / return of the child is reflected in section 10(2)(d). In contrast the wording of Article 21 is not mandatory, so does not constitute a duty / obligation on the Central Authority. This is emphasised in the Pérez-Vera Report, *op. cit.*, n. 43, to the Convention. “With this in view, the article’s third paragraph envisages the possibility of Central Authorities initiating or assisting in such proceedings, either directly, or through intermediaries.” (para. 126). We also note the comments in the Convention that it was never intended to be a comprehensive or exhaustive attempt to regulate access disputes and “...it sufficed at the Convention level merely to secure co-operation among Central Authorities as regards either their organisation or the protection of their actual exercise.” (para. 125, paras. 125-128). Taking these factors into account it is not surprising that there is no express provision in the Guardianship Amendment Act 1991 (nor the Care of Children Act 2004) that mirrors Article 21 of the 1980 Hague Convention.

<sup>89</sup> *Butterworth’s Family Law*, *op. cit.*, n. 12, p. 624.

<sup>90</sup> *Jensen v Olagues* Family Court, Kaikoke FP 027 146 00, 30 September 2002, discussed in *Butterworth’s Family Law*, *op. cit.*, n. 12, p. 624.

child's name on it, as well as any travel documents, be given to the court; and under section 4 of the Passports Act 1992, the Minister can refuse to issue a passport to someone where there is a court order that the applicant remain in New Zealand or surrender their passport.<sup>91</sup> Where a warrant is issued under section 77(3) of the 2004 Act (formerly section 20(1)(a) of the 1968 Act) to take the child and place him or her in the care of some similar person, section 75 of the 2004 Act (formerly section 19B of the 1968 Act) applies, as above, to allow searching of premises and so on.

Once an order preventing removal has been obtained a parent or solicitor can apply to Interpol to load the child's name on to the border control system known as a CAPPs alert. If an attempt is made to remove the child from the country an alert will activate when the child's passport is presented at that port of departure.

Given that New Zealand does not have any land borders children can generally only be removed via one of the international airports which makes it easier to prevent removal of a child once the alert is in place. According to the New Zealand response to the Hague questionnaire on Preventive Measures the port alert system in New Zealand is very successful.<sup>92</sup>

#### 5.1.2 CRIMINAL LAW

As discussed ante at 1.4, section 210 of the Crimes Act 1961 makes it a criminal offence intentionally to deprive a parent or guardian of possession of their child under 16. Additionally, under section 80 of the Care of Children Act 2004 (formerly section 20(3) of the Guardianship Act 1968) it is an offence<sup>93</sup> to take or attempt to take any child out of New Zealand:

- “(a) knowing that proceedings are pending or are about to be commenced under this Act in respect of the child; or
- (b) knowing that there is in force an order of a Court (including an order registered under section 81) giving any other person the role of providing day-to-day care for, or contact with, the child; or
- (c) with intent to prevent an order of a Court (including an order registered under section 81) about the role of providing day-to-day care for, or about contact with, the child from being complied with”.

Such an order can be obtained out of hours and ex parte.

Under section 78 of the Care of Children Act 2004 (formerly section 20(A) of the Guardianship Act 1968) it is an offence to hinder or prevent compliance with a parenting order (which includes contact) with the intention to do so.

<sup>91</sup> See the New Zealand response to Hague Preventive Measures questionnaire, (circulated to all Contracting States by the Permanent Bureau of the Hague Conference in February 2003) see [http://www.hcch.net/index\\_en.php?act=publications.details&pid=3088&dtid=33](http://www.hcch.net/index_en.php?act=publications.details&pid=3088&dtid=33) (hereafter 'Questionnaire').

<sup>92</sup> Ibid.

<sup>93</sup> Liable to a fine not exceeding \$2,500 or to imprisonment up to 3 months, or both.

## 5.2 CENTRAL AUTHORITY PROCEDURE

An application for the return of a child to New Zealand is made under section 102 of the Care of Children Act 2004 (formerly section 9 of the Guardianship Amendment Act 1991).<sup>94</sup> The applicant should apply in writing to the Central Authority and have that claim transmitted to the other Contracting State. On most occasions the Central Authority will require the application to come from counsel and not directly from the applicant. If the applicant is not represented and contacts the Central Authority seeking advice and assistance and if it appears to the Central Authority that the parent may make an application under the Convention, the Central Authority will appoint counsel to assist with the application. As with incoming applications, counsel are drawn from a particular group of expert lawyers. The Central Authority will, however, often use different lawyers for outgoing applications than those used for incoming applications (for example, they generally will not appoint QCs).

The relevant form for outgoing applications is contained in the Guardianship (International Child Abduction) Rules 1991, Schedule 1.<sup>95</sup> Where the application must be translated into another language, the Central Authority will, exceptionally, assist with that translation and bear the costs.

The applicant must prove that the child has been removed to another Contracting State from New Zealand. That evidence is commonly obtained with the assistance of the New Zealand Central Authority, Interpol and / or customs.<sup>96</sup>

Under Article 29 of the 1980 Hague Convention, the applicant can also file the application directly with the relevant court in the other country.

## 5.3 PROTECTION AND ASSISTANCE ON RETURN

The Central Authority generally does not offer protection or assistance upon return, primarily because most of those being returned are New Zealand nationals and accordingly will have the support of their families.<sup>97</sup> There have been a number of cases between Australia and New Zealand where issues of protection have arisen but undertakings are not used.

## 5.4 COSTS AND LEGAL AID

As with applications under sections 103, 105, 112 and 113 of the Care of Children Act (formerly sections 10, 12, 19 and 20 of the 1991 Act), legal representation is available for a return of the child to New Zealand (i.e. one made under section 102 of the 2004 Act (formerly section 9 of the 1991 Act)) applications where the applicant does not have a barrister or solicitor. Counsel will be appointed where the Central Authority believes the circumstances so require.<sup>98</sup>

<sup>94</sup> Casey and de Jong, 2003, op. cit., n. 53, provide detailed notes for practitioners about the procedure for applying for the return of a child under what is now section 102 of the 2004 Act (formerly section 9 of the 1991 Act).

<sup>95</sup> S.R. 1991/121.

<sup>96</sup> See Casey and de Jong, 1995, op. cit., n. 12, p. 4.

<sup>97</sup> Interview with the New Zealand Central Authority in January 2004.

<sup>98</sup> However, *Trapski's Family Law*, op. cit., n. 29, states that 'it is understood that the New Zealand Central Authority has not appointed a lawyer for New Zealanders making applications under section 9, but the applicant may be entitled to legal aid'.

The New Zealand Central Authority requires an undertaking that there are sufficient funds to pay the return of the children in the event of an order being made, and the State will not meet the costs whatever the circumstances.<sup>99</sup>

Legal aid is generally available for outgoing applications on an ex gratia basis, again demonstrating the generosity of the New Zealand system.

### **5.5 OPERATING THE CONVENTION – OUTGOING APPLICATIONS FOR ACCESS**

An application for access to a child outside New Zealand is made under section 112 of the Care of Children Act 2004 (formerly section 19(1) of the Guardianship Amendment Act 1991). Under section 112 of the 2004 Act, the applicant should write to the Central Authority and they will forward the application to the other Contracting State. Subsection (2) requires that the application be made according to the form prescribed by rules.

## **6. AWARENESS OF THE CONVENTION**

### **6.1 EDUCATION OF CENTRAL AUTHORITIES, THE JUDICIARY AND PRACTITIONERS**

When the 1980 Hague Convention was first implemented in New Zealand a judicial seminar was held to discuss the existing jurisprudence. Now newly appointed judges have orientation courses. The judiciary are generally kept up to date with the leading overseas and domestic jurisprudence being sent to them by the Principal Family Court Judge's office. Each judge also has what is known as the "Family Court Bench Book" which has been prepared and kept up to date by Mahony J (until May 2004 the Principal Family Court Judge of the Family Court) and which includes a complete section on the 1980 Hague Convention.

In terms of training personnel, the former Department for Courts has held a forum for counsel who accept appointments to act on behalf of applicants from other Contracting States. The Law Society also provides education to practitioners and this has included seminars in 1995 and 2003 by Margaret Casey and Lex de Jong, specifically on the 1980 Hague Convention. According to the New Zealand response to the questionnaire, the annual Family Law Conference organised by the Family Law Section of the Law Society usually includes sessions on the Hague Convention. Since the Central Authority appoints lawyers from its (unofficial) list of lawyers, well experienced and expert counsel are used in Convention cases. In fact, the lawyers are well regarded not just by the Central Authority but also by the judiciary, and have been referred to as 'the Guardians of the Convention'.<sup>100</sup>

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<sup>99</sup> Casey and de Jong, 2003, op. cit., n. 53, p. 19. In practice the Central Authority will ask what arrangements applicants will make to get the children back from another Contracting State if the removing parent has no funds and / or chooses not to return with the child. Correspondence with the New Zealand Central Authority in May 2004.

<sup>100</sup> This description was first made by Mahony J, the Principal Family Court Judge 1985-2004.

## 6.2 INFORMATION AND SUPPORT PROVIDED TO THE GENERAL PUBLIC

The Ministry of Justice web site provides information on the 1980 Hague Convention, which is primarily aimed at parents who fear their child is about to be abducted or who has been abducted. The relevant forms are available online. The Central Authority believes that the public learn about the Convention when high profile cases are reported in the news, and because of the small population and the high percentage of people who read one of the metropolitan newspapers, there is a better knowledge of the 1980 Hague Convention than in other countries such as the United Kingdom.<sup>101</sup> Information can also be obtained from voluntary organizations such as the Citizens' Advice Bureaux.

## 7. THE CONVENTION IN PRACTICE – A STATISTICAL ANALYSIS OF APPLICATIONS IN 1999<sup>102</sup>

The Central Authority in New Zealand handled a total of 79 new applications in 1999,<sup>103</sup> making New Zealand the eighth busiest Convention jurisdiction in that year.<sup>104</sup>

Incoming return applications	39
Outgoing return applications	29
Incoming access applications	4
Outgoing access applications	7
<b>Total number of applications</b>	<b>79</b>

### 7.1 INCOMING APPLICATIONS FOR RETURN

#### 7.1.1 THE CONTRACTING STATES WHICH MADE THE APPLICATIONS

Requesting States		
	Number of Applications	Percent
Australia	31	79
USA	4	10
UK-England and Wales	3	8
Greece	1	3
<b>Total</b>	<b>39</b>	<b>100</b>

Given the geographical proximity of the two States, it is not surprising that there were many applications made by Australia. Nevertheless, at 79%, the proportion of applications from Australia is striking and is much greater than the

<sup>101</sup> See response to Hague questionnaire on preventive measures, Questionnaire, op. cit., n. 91.

<sup>102</sup> The following analysis is based upon the 1999 Statistical Survey, op. cit., n. 32.

<sup>103</sup> According to the 2002 Statistics, op. cit., n. 34, New Zealand made and received virtually the same number of applications in 2002, namely 40 incoming return applications, 32 outgoing return applications, 3 incoming access applications and 5 outgoing access applications, making a total of 80 applications.

<sup>104</sup> USA, England and Wales, Germany, Australia, France, Italy and Canada all handled more cases in 1999.

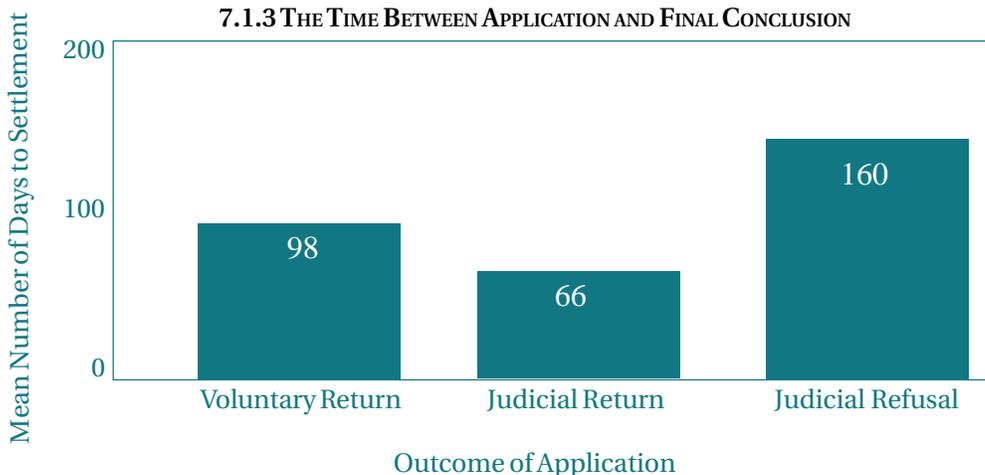
34% of applications made by New Zealand to Australia. It is interesting that only 4 Contracting States were involved in the 39 applications received by New Zealand. A similar pattern can be seen in the 2002 statistics<sup>105</sup> with 34 applications being made by Australia, 4 by England and Wales, 1 by Scotland and 1 by South Africa.

### 7.1.2 THE OUTCOMES OF THE APPLICATIONS

Outcome of Application		
	Number	Percent
Rejection	0	0
Voluntary Return	4	10
Judicial Return	22	56
Judicial Refusal	4	10
Withdrawn	9	23
Pending	0	0
Other	0	0
<b>Total</b>	<b>39</b>	<b>~100</b>

The overall return rate from New Zealand is 66%, which was significantly higher than the global norm of 50%. Fifty six percent of applications to New Zealand resulted in a judicial return, which is much higher than the global norm of 32%. In contrast, there was a lower proportion of voluntary returns, only 10%, compared with the global norm of 18%. Indeed, nearly 85% of those cases which resulted in return were dealt with judicially compared to the global norm of 64%. Of the 26 applications which went to court, 85% ended in a judicial return, which is higher than the global proportion of 74%. Overall, the proportion of judicial refusals, 10%, was however similar to the global norm of 11%. Totalling 23%, the withdrawal rate was also higher than the global norm of 14%. Conversely, no applications were rejected and there were no pending cases.<sup>106</sup>

### 7.1.3 THE TIME BETWEEN APPLICATION AND FINAL CONCLUSION



<sup>105</sup> 2002 Statistics, op. cit., n. 34.

<sup>106</sup> Strict comparisons cannot yet be made with the 2002 Statistics, op. cit., n. 34, since at the time of writing 7 of the 40 applications were still pending. However, in broad terms, the outcomes look similar with so far 20 return orders being made, 4 refusals, 1 voluntary return, 7 withdrawn and 1 rejected.

Information regarding timing was available for 21 of 22 judicial returns, and 3 of the 4 voluntary returns and judicial refusals. The chart above, therefore, relates to these cases only.

Judicial returns were handled, on average, within 66 days which was considerably quicker than the global mean of 107 days. Indeed, New Zealand was one of the quickest jurisdictions included in this analysis with regard to judicial returns. Taking an average of 160 days, judicial refusals took slightly longer than the global mean of 147 days. Averaging 98 days, voluntary returns also took slightly longer than the global average of 84 days.

Number of Days Taken to Reach Final Outcome			
	Outcome of Application		
	Voluntary Return	Judicial Return	Judicial Refusal
Mean	98	66	160
Median	88	60	114
Minimum	81	7	84
Maximum	124	159	282
<b>Number of Cases</b>	<b>3</b>	<b>21</b>	<b>3</b>

The table above shows the number of cases for which we had information regarding time, the mean and median average number of days to final outcome and the minimum and maximum number of days. This gives a more informative picture of the system in New Zealand. It is to be noted that no applications were still pending and consequently, the slowest judicial decision was reached within 282 days of the making of application.

We have information regarding one application which was appealed. Proportionally, this case accounts for fewer than 4% of all the cases which went to court. This is below the global norm of 14% but it is noted that this is only based on the one case. The application resulted in a judicial return and took 149 days to reach a final outcome. The time taken for this application is included in the overall average of 66 days for judicial returns, which again highlights the speed of the New Zealand system with regard to judicial returns.

## 7.2 INCOMING APPLICATIONS FOR ACCESS

### 7.2.1 THE CONTRACTING STATES WHICH MADE THE APPLICATIONS

At 4 out of 43 incoming applications the proportion of access applications received was below the global norm of 17% at just 9% of all applications received.<sup>107</sup> Three of the four access applications came from England and Wales, the fourth application being from Canada. Whereas a high proportion of return applications were made by Australia, there were no access applications made by this State.

<sup>107</sup> In 2002 incoming access applications amounted to just 7% of all incoming applications. See the 2002 Statistics, op. cit., n. 34.

### 7.2.2 THE OUTCOMES OF THE APPLICATIONS

In 3 of the 4 applications, 75%, access was either granted or agreed which is above the global norm of 43%. Indeed, in all three cases where a resolution was sought, access was obtained. One application for access was withdrawn. In one case access was voluntarily agreed and in the other two cases access was judicially ordered. There were no judicially refused applications. As with the return applications, there were also no pending access applications.

### 7.2.3 THE TIME BETWEEN APPLICATION AND FINAL CONCLUSION

The voluntary settlement was concluded in 6 to 12 weeks. This compares favourably to global norms where 42% of voluntary settlements took over 6 months to be reached. On the other hand, the two judicially determined access applications both took over 6 months to be resolved. Globally, 71% of judicial decisions also took over 6 months. This type of profile is a common one and illustrates how generally quick and efficient jurisdictions find it more difficult to cope with access applications. Nevertheless, as with return applications, there were no pending cases and therefore all applications received by the New Zealand Central Authority had reached a conclusion.

## 8. CONCLUSIONS

In conclusion it can be said that in most respects New Zealand has implemented the 1980 Hague Convention effectively. Certainly, for the most part, New Zealand complies with the recommendations as to good practice contained in the *Guide to Good Practice on Central Authority Practice and Implementing Measures* published by the Permanent Bureau of the Hague Conference.<sup>108</sup> The Central Authority operates efficiently and effectively. Communication about the Convention is good. Information about the Convention is provided on the Ministry of Justice web site and the relevant forms are online. So far, language has not proved a problem though to date almost all applications are from English speaking countries. Although voluntary returns are below the global average and indeed the Central Authority can be criticised for not itself promoting voluntary outcomes, the overall return rates are above the global average with the *courts* very much operating the spirit of the Convention with a much lower than average judicial refusal rate.<sup>109</sup> Furthermore, New Zealand is among the most efficient in disposing of applications speedily.<sup>110</sup> New Zealand no doubt in these respects derives advantage in concentrating jurisdiction in a few well

<sup>108</sup> See *Guide to Good Practice*, Parts 1, *Central Authority Practice* and II *Implementing Measures (Jordan's Family Law, 2003)* (hereafter '*Jordan's Family Law*') and available on the Hague Conference on Private International Law web site at [http://www.hcch.net/index\\_en.php?act=conventions.publications&dtid=3&cid=24](http://www.hcch.net/index_en.php?act=conventions.publications&dtid=3&cid=24)

<sup>109</sup> I.e. only 15% of cases going to court compared with the global norm of 24% see ante 7.1.2. The overall refusal rate at 10% is, ironically, only marginally below the global average of 11%.

<sup>110</sup> Even so, even New Zealand would struggle to meet the six weeks target for all court disposals envisaged by Article 11(3) of the revised Brussels II Regulation (viz. Council Regulation (EC) No. 2201/2003 of 27 November 2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No. 1347/2000, OJ L 338 (23.12.2003) which, from 1 March 2005, applies to abductions between Member States of the European Union other than Denmark.)

trained and well informed judiciary. Furthermore the Family Court sits in the place where the application is filed.

Another important asset of the New Zealand system lies in its generosity in providing legal aid (despite entering into a reservation under Article 26) both in respect of incoming and outgoing cases even to the extent of exceptionally paying repatriation costs on an ex gratia basis if these costs cannot be paid by the applicant.

Although in many ways New Zealand should be seen as a model Convention jurisdiction, its system is not beyond points of concern. Efficient though the Central Authority is, it is seriously under resourced with an over reliance on a single person (though steps have been taken in 2004 to provide cover during the Hague Convention Advisor's absence, see ante at 2.1) which is contrary to the *Good Practice: Central Authority Practice* recommendations.<sup>111</sup> More resources are needed both for support staff and at the very least an "understudy" so as to provide continuity and to cover illness and holidays.

One curiosity of the New Zealand system is that its implementing legislation, now the Care of Children Act 2004, Part 2, sub-part 4, (formerly the Guardianship Amendment Act 1991) attempts to rewrite the terms of the Convention in the main body of the Act. In this respect New Zealand is comparable with Australia but it is not a practice to be recommended. Like Australia, New Zealand has experienced difficulties where the domestic version differs from the Convention wording, and like Australia, this has necessitated in some consequential legislative reform. All that would have been avoided had the Convention simply been incorporated into New Zealand law.

## 9. SUMMARY OF CONCERNS

- The Central Authority is under resourced and over reliant on a single (albeit excellent) worker (although steps have been taken in 2004 to provide cover during periods of absence).
- The Central Authority makes no attempt to promote voluntary outcomes.
- The domestic legislation is not worded in precisely the same terms as the Convention. This has already caused difficulties and could create further problems.
- The Central Authority practice of appointing counsel for the applicants tends to restrict those involved and could prevent other lawyers from developing an interest and expertise in the area.
- Preventing removal of the child could be simplified if a court order was not necessary to put a port alert in place and prevent the child being removed.

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<sup>111</sup> *Jordan's Family Law*, op. cit., n 108, at 2.4.

## 10. SUMMARY OF GOOD PRACTICES

- In most respects New Zealand is a model Convention jurisdiction.
- The Central Authority is efficiently run by a very experienced staff – a “well-oiled machine”.
- There is information on the Ministry of Justice web site and the relevant forms are online.
- There appears a general high awareness of the Convention among the population at large.
- There is a generous legal aid system for both incoming and outgoing applications.
- There are no location difficulties.
- Jurisdiction to hear Convention cases is concentrated in a few well informed and trained judges who sit in the place where the application is filed.
- Counsel are similarly well versed in Convention law and are regarded “the guardians of the Convention”.
- Judges interpret the Convention according to its spirit and there is a high rate of return orders.
- There are no particular problems with enforcement.

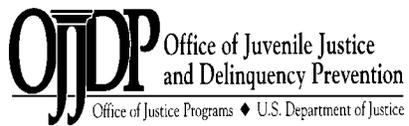
### APPENDIX

As at 1 January 2005, the Convention is in force between the following 68 Contracting States and New Zealand.

<b>Contracting State</b>	<b>Entry into Force</b>
ARGENTINA	1 OCTOBER 1991
AUSTRALIA	1 JUNE 1992
AUSTRIA	1 NOVEMBER 1994
BAHAMAS	1 NOVEMBER 1995
BELARUS	1 JANUARY 2003
BELGIUM	1 MAY 2003
BRAZIL	1 JANUARY 2003
BULGARIA	1 JANUARY 2005
BURKINA FASO	1 NOVEMBER 1995
CANADA	1 JULY 1992
CHILE	1 NOVEMBER 1995
CHINA-MACAO SPECIAL ADMINISTRATIVE REGION	1 SEPTEMBER 2003
COLOMBIA	1 MARCH 1998
COSTA RICA	1 JANUARY 2003
CYPRUS	1 NOVEMBER 1995
CZECH REPUBLIC	1 AUGUST 1998
DENMARK	1 OCTOBER 1991
ECUADOR	1 NOVEMBER 1995
EL SALVADOR	1 JANUARY 2003
ESTONIA	1 JANUARY 2005

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FIJI	1 FEBRUARY 2000
FINLAND	1 AUGUST 1994
FRANCE	1 JANUARY 1992
GEORGIA	1 MARCH 1998
GERMANY	1 FEBRUARY 1992
GREECE	1 OCTOBER 1997
GUATEMALA	1 JANUARY 2005
HONDURAS	1 NOVEMBER 1995
HUNGARY	1 APRIL 1997
ICELAND	1 MARCH 1998
IRELAND	1 OCTOBER 1991
ISRAEL	1 FEBRUARY 1992
ITALY	1 APRIL 1997
LATVIA	1 JANUARY 2005
LITHUANIA	1 JANUARY 2005
LUXEMBOURG	1 OCTOBER 1991
MALTA	1 JANUARY 2003
MAURITIUS	1 NOVEMBER 1995
MEXICO	1 DECEMBER 1991
REPUBLIC OF MOLDOVA	1 JANUARY 2003
MONACO	1 NOVEMBER 1995
NETHERLANDS	1 SEPTEMBER 1991
NICARAGUA	1 JANUARY 2003
NORWAY	1 OCTOBER 1992
PANAMA	1 NOVEMBER 1995
PARAGUAY	1 JANUARY 2003
PERU	1 JANUARY 2005
POLAND	1 NOVEMBER 1995
PORTUGAL	1 AUGUST 1992
ROMANIA	1 NOVEMBER 1995
SAINT KITTS AND NEVIS	1 MARCH 1998
SERBIA AND MONTENEGRO	1 NOVEMBER 2003
SLOVAK REPUBLIC	1 FEBRUARY 2001
SLOVENIA	1 NOVEMBER 1995
SOUTH AFRICA	1 MARCH 1998
SPAIN	1 JULY 1992
SRI LANKA	1 JANUARY 2005
SWEDEN	1 AUGUST 1992
SWITZERLAND	1 SEPTEMBER 1992
THAILAND	1 JANUARY 2005
TRINIDAD AND TOBAGO	1 JANUARY 2003
TURKMENISTAN	1 JANUARY 2003
UNITED KINGDOM	1 OCTOBER 1991
UNITED STATES OF AMERICA	1 OCTOBER 1991
URUGUAY	1 JANUARY 2003
UZBEKISTAN	1 JANUARY 2003
VENEZUELA	1 SEPTEMBER 1997
ZIMBABWE	1 NOVEMBER 1995



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